

Deutsche Bank Natl. Trust Co. v Contact Holdings Corp.

2023 NY Slip Op 32827(U)

July 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 507319/22

Judge: Lawrence Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm-6. of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of July, 2023.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
DEUTSCHE BANK NATIONAL TRUST COMPANY,
As Trustee for Morgan Stanley Capital I, Inc. Trust
2006-NC1, Mortgage Pass-Through Certificates,
Series 2006-NCI,

Plaintiffs,

-against-

Index No. 507319/22

CONTACT HOLDINGS CORP.; STATE OF NEW YORK; CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; CITY OF NEW YORK PARKING VIOLATIONS BUREAU; CITY OF NEW YORK CITY ADJUDICATION BUREAU; and "JOHN DOE #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the Subject Property described in the Complaint,

Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	39-40 _____
Opposing Affidavits (Affirmations) _____	53 _____
Affidavits/ Affirmations in Reply _____	57 _____
Other Papers: _____	_____ _____

Upon the foregoing papers, defendant Contact Holdings Corp. (Contact) moves for an order, pursuant to CPLR 3212 (a) (5), granting summary judgment dismissing the complaint of plaintiff Deutsche Bank National Trust Company, As Trustee for Morgan Stanley Capital I, Inc. Trust 2006-NC1, Mortgage Pass-Through Certificates, Series 2006-NCI as barred by the statute of limitations.

Plaintiff commenced this action to foreclose a mortgage encumbering the subject property at 1026 Madison Street in Brooklyn. The mortgage was executed on August 26, 2005, by Jeff Allenstein (borrower) to secure a \$474,050 loan from New Century Mortgage Corporation. By assignment dated December 22, 2009, the mortgage and note were assigned to plaintiff. On February 9, 2010, plaintiff commenced a prior foreclosure action against the borrower (*Deutsche Bank National Trust Company, As Trustee v Allenstein, et al.*, Kings County index No. 3561/10)(the prior action) upon an alleged default in payment. The borrower failed to timely answer the complaint in the prior action. However, plaintiff did not seek a default judgment until September 2014, more than four years after the borrower's default in answering. In the meantime, the subject property was conveyed from the borrower to Contact by deed dated September 24, 2012. By order dated October 16, 2015, plaintiff's motion for a default judgment was denied without prejudice with leave to renew upon a showing of a reasonable excuse for the delay and a meritorious action.

By notice of motion dated November 22, 2016, plaintiff again moved in the prior action for leave to enter a default judgment and for an order of reference. Contact cross-moved for leave to intervene in the prior action and to dismiss the complaint as

abandoned pursuant to CPLR 3215 (c). By order dated October 12, 2017, those branches of plaintiff's motion for leave to enter a default judgment and for an order of reference were granted and the cross motion of Contact for leave to intervene in the action and to dismiss the complaint as abandoned was denied. By separate order dated October 12, 2017, a referee was appointed to compute the amount due to the plaintiff. Contact thereafter appealed the orders to the Appellate Division, Second Department.

By decision and order dated January 19, 2022, the Second Department reversed the October 12, 2017 orders, denied those branches of plaintiff's motion which were for leave to enter a default judgment and for an order of reference, and granted the cross motion of Contact for leave to intervene in the prior action and to dismiss the complaint as abandoned under CPLR 3215 (c) (*Deutsche Bank Natl. Trust Co. v Allenstein*, 201 AD3d 783 [2d Dept 2022]). Ostensibly relying on the savings provision of CPLR 205 (a), plaintiff commenced the instant foreclosure action against Contact on March 11, 2022. Contact now moves to dismiss the instant action as untimely under CPLR 3211 (a) (5) as it was brought more than six years after the mortgage debt was accelerated by the commencement of the prior action. Contact argues that the recently enacted Foreclosure Abuse Prevention Act (FAPA) made CPLR 205 (a) inapplicable to foreclosure actions, and replaced said statute with a new savings provision, CPLR 205-a, which explicitly excepts foreclosure actions that had been previously dismissed as abandoned under CPLR 3215 (c).

An action to foreclose a mortgage is subject to a six-year statute of limitations (*see* CPLR 213 [4]). Here, Contact established that the six-year statute of limitations began to

run on the entire debt, at the latest, on February 9, 2010, when plaintiff accelerated the mortgage debt by commencing the prior action (*see HSBC Bank USA, N.A. v Gold*, 171 AD3d 1029, 1030 [2d Dept 2019]; *EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603 [2d Dept 2005]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]). Since plaintiff did not commence the instant action until March 11, 2022, Contact sustained its initial burden on his motion to dismiss on statute of limitations grounds (*see Bank of N.Y. Mellon v Craig*, 169 AD3d 627, 629 [2d Dept 2019]; *U.S. Bank N.A. v Martin*, 144 AD3d 891, 892 [2d Dept 2016]). The burden thus shifts to plaintiff to present admissible evidence establishing that the action was timely or to raise a triable issue of fact as to whether the action was timely (*see Bank of N.Y.*, 169 AD3d at 629; *U.S. Bank N.A.*, 144 AD3d at 892).

In opposition to Contact's motion to dismiss, plaintiff argues that this action is timely under the savings provision of CPLR 205 (a) then in effect, which provides the following:

(a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period. Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth

on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

Under the prevailing Second Department case law at the time the instant action was commenced, where dismissal of the prior action was for abandonment under CPLR 3215 (c), the order dismissing the prior action on said ground must “include . . . findings of specific conduct demonstrating a general pattern of delay in proceeding with the litigation” (*Wells Fargo Bank, N.A. v Eitani*, 148 AD3d 193, 198 [2d Dept 2017]; *appeal dismissed* 29 NY3d 1023 [2017], quoting CPLR 205 [a] [*“Eitani”*]; see *Wells Fargo Bank N.A. v Kehres*, 199 AD3d 869 [2d Dept 2021] [*“Kehres”*]; *HSBC Bank USA, N.A. v Janvier*, 187 AD3d 999 [2d Dept 2020] [*“Janvier”*]). The Appellate Division order dismissing the prior action here did not set forth findings of specific conduct demonstrating a general pattern of delay.

FAPA, which went into effect on December 30, 2022 [L 2022, ch 821], codified a new savings statute, CPLR 205-a, which provides, in relevant part:

(a) If an action upon an instrument described under subdivision four of section two hundred thirteen of this article is timely commenced and is terminated in any manner other than a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for any form of neglect, including, but not limited to those specified in subdivision three of section thirty-one hundred twenty-six, section thirty-two hundred fifteen, rule thirty-two hundred sixteen and rule thirty-four hundred four of this chapter, for violation of any court rules or individual part rules, for failure to comply with any court scheduling orders, or by default due to nonappearance for conference or at a calendar call, or by failure to timely submit any order or judgment, or upon a final judgment upon the merits, the original plaintiff, or, if the original plaintiff dies and the cause

of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination, provided that the new action would have been timely commenced within the applicable limitations period prescribed by law at the time of the commencement of the prior action and that service upon the original defendant is completed within such six-month period . . .

FAPA also amended CPLR 205 to provide that it no longer applies to mortgage foreclosure actions (CPLR 205 [c]). CPLR 205-a provides that, in order for a plaintiff to take advantage of the new statute's savings provision, the prior action must not have been dismissed "for any form of neglect." Where the earlier termination is for neglect, including abandonment under CPLR 3215 (c), CPLR 205-a bars a party from invoking the savings clause "even if the court failed to set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay" (*U.S. Bank N.A. v Fox*, 216 AD3d 445, 446 [1st Dept 2023], quoting CPLR 205 [a]). CPLR 205-a was enacted to provide

"a specific savings statute for foreclosures 'in order to address judicial decisions that have been contrary to the spirit of this savings provision which have been overly indulgent of foreclosure plaintiffs whose cases have been dismissed for various forms of neglect, who are not entitled to the six months grace period means for diligent plaintiffs whose cases were dismissed for reasons that do not reflect their own fault'" (*U.S. Bank N.A. v Pierre*, 78 Misc 3d 870, 872 [Sup Ct, Suffolk County 2023], quoting Assembly Mem in Support of 2021 NY Assembly Bill A7737B, enacted as L 2022, ch 821, § 6).

The Senate Sponsor's Memorandum in Support stated that FAPA "aims to clarify the meaning of existing statutes, codify correct judicial applications thereof, and rectify

erroneous judicial interpretations thereof” (Sponsor’s Mem in Support, 2022 NY Senate Bill S5473D, NYSCEF Doc No 60, at 1). Citing to *Etani*, *Kehres* and *Janvier*, among other decisions, the memorandum states “[t]he Legislature finds that there has been extraordinary abuse and judicial misinterpretation of the ‘savings provision’ of CPLR 205 (a) in the context of mortgage foreclosure actions” and that the language in CPLR 205 (a) that the court “set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation” has “occasioned erroneous judicial interpretations that the court’s recitation of” said language “is a condition precedent to the bar against an extension of the statute of limitations for a neglect based dismissal” (*id.* at 10).

FAPA provides that it “shall take effect immediately and shall apply to all actions commenced on an instrument described under subdivision four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced” (2022 McKinney’s Sess Law News of NY, ch 821, § 10). Plaintiff argues that FAPA does not apply retroactively to actions commenced prior to its enactment and, if FAPA was intended by the Legislature to apply retroactively to pending actions, such would violate the Takings Clause and Due Process Clause of the United States and New York Constitutions.

In *U.S. Bank v Fox* (212 AD3d 422 [1st Dept 2023]), the Appellate Division, First Department reversed an order of the Supreme Court, entered on or about February 22, 2022, dismissing the complaint as time barred. The First Department held that the action was not time-barred, as it was brought within six months of the dismissal of the prior

foreclosure action in accordance with CPLR 205 (a) and because the Supreme Court, in dismissing the case due to the plaintiff's unreadiness to go forward with the scheduled trial, did not set forth on the record "any additional instances of neglect by the plaintiff that could demonstrate a general pattern of delay in proceeding with the litigation" (*U.S. Bank*, 212 AD3d at 422 [citation and internal quotation marks omitted]). Following the enactment of FAPA, the First Department permitted the parties to brief the effect of FAPA on the case. In its subsequent decision, the First Department recalled and vacated the prior decision, recognizing that CPLR 205-a was to be applied retroactively to the subject action which was pending on the date of FAPA's enactment (*U.S. Bank N.A.*, 216 AD3d at 446-447).¹

U.S. Bank N.A. v Onuoha (216 AD3d 1069 [2d Dept 2023]), involved the pre-FAPA commencement under CPLR 205 (a) of an action previously dismissed by the Appellate Division, Second Department as abandoned under CPLR 3215 (c). The prior Second Department dismissal order in said case (*US Bank, N.A. v Onuoha*, 162 AD3d 1094 [2d Dept 2018]) did not set forth findings of specific conduct demonstrating a general pattern of delay in proceeding with the litigation. In finding the second action untimely, the Second Department set forth the language of CPLR 205-a and stated that because "the complaint in the 2008 action was dismissed insofar as asserted against the

¹ "While the Supreme Court is bound to apply the law as promulgated by the Appellate Division in its own Department, where the issue has not been addressed within that Department, the Supreme Court is obligated to follow the precedent set by the Appellate Division of another Department until its home Department or the Court of Appeals pronounces a contrary rule" (*Maple Med., LLP v Scott*, 191 AD3d 81, 90 [2d Dept 2020]).

defendant as abandoned pursuant to CPLR 3215 (c).” the plaintiff was “not entitled to the benefit of the savings provision of CPLR 205 (a) or 205-a.” FAPA was likewise applied retroactively to other foreclosure actions pending before the Second Department (*ARCPE I, LLC, v DeBrosse*, --- AD3d --- , 2023 NY Slip Op 03498 [2d Dept 2023]; *MTGLQ Investors, L.P. v Singh*, 216 AD3d 1087 [2d Dept 2023]).

In light of the foregoing appellate authority, the court finds that CPLR 205-a is applicable to the instant action. Because CPLR 205-a excepts prior actions dismissed as abandoned, plaintiff cannot avail itself of the savings provision of said statute to maintain this untimely action.

As to plaintiff’s argument regarding the constitutionality of FAPA’s retroactive application, the court has not come across any controlling case law addressing this issue. However, the court finds that the Legislature’s intent to apply CPLR 205-a retroactively to then pending actions is constitutionally valid. “It is well settled that the acts of the Legislature are entitled to a strong presumption of constitutionality” (*American Economy Ins. Co. v State of New York*, 30 NY3d 136, 149 [2017] [citations and internal quotation marks omitted]; see *Matter of Calverton Manor, LLC v. Town of Riverhead*, 160 AD3d 829 [2d Dept 2018]). Further, plaintiff “bear[s] the ultimate burden of overcoming that presumption by demonstrating the [act’s] constitutional invalidity beyond a reasonable doubt (*American Economy Ins. Co.*, 30 NY3d at 1490).

“The Takings Clause of the Fifth Amendment of the US Constitution, made applicable to the States through the Fourteenth Amendment, . . . provides that private property shall not be taken for public use, without just compensation. The New York

Constitution similarly provides that private property shall not be taken for public use without just compensation” (*American Economy Ins. Co.*, 30 NY3d at 155 [citations and internal quotation marks omitted]). While plaintiff may claim a vested property interest in its mortgage lien, CPLR 205-a does not abrogate the lien itself, nor effect the amount of indebtedness which a mortgagee may recover. Rather, it simply clarifies the circumstances in which a plaintiff is entitled to the statute of limitations savings clause when a prior foreclosure action is dismissed.

“Although the justifications that suffice for the prospective nature of a legislative enactment may not suffice for its retroactive nature, the test of substantive due process for retroactive legislation ‘is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose’” (*American Economy Ins. Co. v State of New York*, 30 NY3d at 158, quoting *Pension Benefit Guaranty Corporation v R.A. Gray & Co.*, 467 US 717, 730 [1984]). Here, the retroactive application of the new savings statute to pending actions is justified by the rational legislative purpose of clarifying the true intent of the savings provision of CPLR 205 (a), which was to benefit plaintiffs whose cases were dismissed through no fault of their own, unlike plaintiffs whose actions were dismissed due to inexcusable delay in prosecuting the matters (*cf. HSBC Bank USA, N.A. v Besharat*, 2023 NY Slip Op 23156 [Sup Ct., Putnam County 2023] [court found retroactive application of specific provision in CPLR 205-a requiring that service be completed within six months of commencement (rather than simply effected under CPLR 205 [a]) unconstitutional as there was no perceptible connection

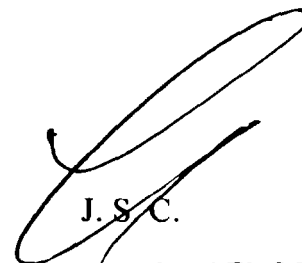
between the amendment and FAPA's purported legislative purpose to correct abusive litigation tactics by mortgage lenders).

Moreover, because CPLR 205-a does not affect the statute of limitations nor the time a cause of action for foreclosure accrues, but merely delineates the types of dismissals excepted from the savings provision, plaintiff has not established a basis for finding a procedural due process violation in retroactively applying CPLR 205-a to the instant action (*see HSBC Bank USA, N.A. v IPA Asset Mgt., LLC*, 2023 NY Slip Op 23151 [Sup Ct, Suffolk County 2023]).

Accordingly, Contact's motion to dismiss this action under CPLR 3211 (a) (5) is granted. The complaint is hereby dismissed.

The foregoing constitutes the decision, order and judgment of the court.

ENTER,



J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE